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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

GLEN BURTON AKE,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITIONER'S REPLY BRIEF

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November 30, 1983

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Respondent's opposition to the petition for a writ of certiorari misstates the facts of this case and confuses the questions presented for review.

I. Petitioner's Sanity was Clearly and Seriously at Issue in the Trial Court.

Respondent cites Pedrero v. Wainwright, 590 P.2d 1383 (5th Cir. 1979), for the proposition that an indigent defendant's sanity at the time of the crime must be "seriously in issue" before the state is obliged to provide him with a psychiatric examination or the means to obtain one. Opposition at 8. Petitioner does not take exception to this standard. But this is not the standard that was applied to him under Oklahoma law. In Oklahoma, an indigent defendant is not entitled to a psychiatric examination even if his sanity at the time of the crime is seriously in issue. Ake v. State, 663 P.2d 1, 6 (Okla. Cr. App. 1983), Appendix to Petition for Certiorari (hereinafter "Pet. App.") at 6.

Oklahoma attempts to avoid review of its policy by arguing, in essence, that petitioner Ake was not harmed by the application of the policy in this case because "there is nothing" in the record to support his insanity defense. Opposition at 7. The facts are otherwise.

Petitioner's mental state at arraignment was so obviously abnormal that the judge sua sponte ordered him committed for observation. He was at first found incompetent to stand trial, and seven weeks later rendered "competent" only by being heavily sedated with large doses of Thorazine three times a day during the trial. The doctors who examined him concluded that he was suffering from paranoid schizophrenia at a psychotic level. Tr. 576, 592, Pet. App. 41, 47.

Dr. Allen, a court-appointed psychiatrist who examined Ake to determine his competency to stand trial, testified that Ake's mental illness may have dated from childhood, and that the illness may have been "apparent" on the day of the crime. Tr. 566, Pet. App. 36. Dr. Garcia, Chief Forensic Psychiatrist at Eastern State Hospital, examined Ake at length and was asked the hypothetical question whether a person of Ake's mental condition who consumed large quantities of alcohol and hallucinogenic drugs together (as Ake did on the day of the crime) would be able to distinguish right from wrong. He testified: "I would consider him unable to do so." Tr. 592, Pet. App. 47.

Under Oklahoma law, a defendant has the burden only of raising a reasonable doubt of his sanity at the time of the crime in order to put his mental condition in issue. Ake v. State, 663 P.2d at 10, Pet. App. 10. In light of this standard and the evidence just reviewed, it is fatuous for the State to contend that Ake's sanity was not seriously placed in issue. The fact that no testimony was presented bearing more specifically on his mental state on the day of the crime is attributable solely to the State's unconstitutional refusal to provide the means for him to be examined on that subject by even a single psychiatrist or psychologist.

Respondent now contends that the psychiatric examination given to Ake to determine his competency to stand trial somehow provided whatever psychiatric examination may have been necessary on the question of his sanity at the time of the crime. Opposition at 6-7. But the State did not sing that tune at trial. Rather, it emphasized to the jury, during the examination of the medical witnesses and in closing argument, that the psychiatrists who had examined Ake could not testify about Ake's mental state on the day of the crime. Tr. 564, 566, 584, 597, 602, Pet. App. 34, 36, 45, 49, 51. This was true at the trial and it remains true: Ake was never examined with respect to his mental condition at the time of the crime.

II. Petitioner's Constitutional Claims were Adequately Preserved.

Respondent suggests that both questions presented in the petition for certiorari were waived below. Opposition at 8-10. To the contrary, they were adequately preserved.

A. The Denial of Psychiatric Examination. At a pre-trial conference, defense counsel notified the court of defendant's intention to plead not guilty by reason of insanity. Counsel also moved, in view of defendant's indigency, for the provision of even "a meagre amount of funds" to retain a psychiatrist or, alternatively, for the appointment of a psychiatrist to examine Ake with respect to his sanity at the time of the crime. Tr. 19-25, Pet. App. 26-32. Counsel specifically articulated the constitutional claim at that time, arguing to the court that "under the constitution [defendant] is entitled to monies for a psychiatrist as if he were another Cullen Davis who had the money to pay for it." Tr. 19, Pet. App. 26. The court denied the motion, relying on United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953) for the proposition that a State has no constitutional duty to provide such an examination for indigent defendants. Tr. 24, Pet. App. 31.

On appeal, Ake contended that "he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist . . . as incident to his constitutional rights" Ake v. State, 633 P.2d at 6, Pet. App. 6. The Court of Criminal Appeals considered and rejected this claim on the merits, following a consistent line of Oklahoma decisions holding that "the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." Id., and see Irvin v. State, 617 P.2d 583 (Okla. Cr. App. 1980) and cases cited therein.

Respondent calls attention to the fact that this claim was not listed in defendant's motion for a new trial, filed in the trial court one day after the jury's verdict, and argues that the claim was therefore waived. Opposition at 8-9. That contention is without merit. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." Raley v. Ohio, 360 U.S. 423, 436 (1959). Where, as here, the highest state court "reached and decided" the federal question, "[t]hat is sufficient." Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

B. The Drugging During Trial. The State does not argue, for it could not, that petitioner's claim with respect to being drugged at trial was not preserved on appeal. See Motion for New Trial ¶¶ 8, 10 (Appendix 4 to Opposition); Ake v. State, 633 P.2d at 6-7, Pet. App. 6-7. Rather, it argues that the point was waived in the trial court. Respondent's reasoning seems to be that because defense counsel waived a pre-trial hearing on "present sanity," Ake's heavily sedated, zombie-like state during the trial could not be considered by the trial court on the motion for a new trial or by an appellate court. Opposition at 9-10.

The Oklahoma Court of Criminal Appeals found, to the contrary, that Ake's "refusal [or inability] to communicate with his attorneys was brought to the attention of the trial judge." 633 P.2d at 7, Pet. App. 7 (emphasis added). The state appellate

court saw no obstacle to its consideration of this issue on appeal, and dealt with it at some length. 633 P.2d at 6-8, Pet. App. 6-8. Since the issue was preserved in the motion for a new trial, and was raised in and addressed on the merits by the state appellate court, it is properly before this Court. Raley v. Ohio, supra; Jenkins v. Georgia, supra.

III. This Case Merits Plenary Review.

Respondent does not deny the importance of the issues presented for review. This Court has previously granted certiorari on the question whether a state is constitutionally required to provide expert psychiatric assistance to an indigent defendant whose sanity at the time of the offense is substantially in dispute. Bush v. Texas, 372 U.S. 586 (1963). However, the question was never decided because that case was remanded upon Texas' offer, at oral argument, to provide the defendant with a new trial at which psychiatric evidence would be presented. Id.

As noted above, the trial court in this case relied on United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), in denying petitioner's request for psychiatric assistance. The State of Oklahoma continues to rely on that decision in this Court. Opposition at 8. Other states follow the same policy. See Petition for Certiorari at 14. But in Baldi a court-appointed psychiatrist did examine the defendant as to his mental state at the time of the crime, and testified on that subject at trial. 344 U.S. at 568. This fact appears to have been crucial to the Court's holding that no further psychiatric assistance was due to the defendant. Id. To the extent, if any, that Baldi stands for the proposition that there is "no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense," Opposition at 8, a number of federal and state courts have recognized that it "was severely undercut by the Court's decision in Griffin v. Illinois, [351 U.S. 12 (1956)]." Pedrero v. Wainwright, 590 P.2d 1383, 1390 n. 6 (5th Cir. 1979).

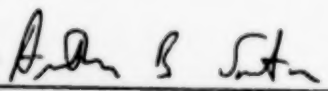
In the Baldi case both the majority and the dissent quoted with approval the Pennsylvania Supreme Court's statement that it is "a principle imbedded in the common law . . . that no insane person can be . . . executed." 344 U.S. at 569, 571. It is time for this Court to enforce that principle, and to make it clear to the states that they may not railroad insane indigent defendants to their deaths by failing to provide them with the necessary means to prove their insanity to the judge and jury.

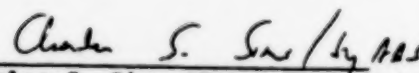
In this case, an indigent defendant displaying obvious signs of severe and long-standing mental illness at arraignment and at trial was denied any psychiatric examination directed to his sanity at the time of the crime. He was convicted after a one-day trial, and was sentenced to death. This case provides an appropriate occasion for the Court to consider this important constitutional issue.

Conclusion

For the reasons given above and in the Petition for a Writ of Certiorari, the Writ should be granted in this case.

Respectfully submitted,


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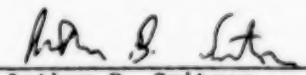

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November 30, 1983

Certificate of Service

I hereby certify that one copy of the foregoing Petitioner's Reply Brief was served by United States mail, first-class postage prepaid, upon counsel of record for respondent, David W. Lee, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this 30th day of November, 1983. I further certify that all parties required to be served have been served.


Arthur B. Spitzer